

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
941 North Capitol Street, NE Suite 9100
Washington, DC 20002

DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS
Petitioner,

v.

SESAY MUSTAPHA
Respondent

Case No.: CR-I-05-P100028

FINAL ORDER

I. Introduction

This case involves a Notice of Infraction served on Respondent Sesay Mustapha on September 2, 2005 alleging a violation of D.C. Official Code § 47-2834 for vending on public space without a license.¹ The violation is alleged to have occurred on August 24, 2005 in the 500 Block of C Street N.W. The Government sought a fine of \$2,000 for the violation.

Respondent denied the allegations and a hearing was set for November 4, 2005. At the hearing held on that date, David Lang of the Office of Civil Infractions appeared and testified for the Government, presenting the Government's case based on documents and pre-hearing

¹ D.C. Official Code § 47-2834 provides:

Sales on streets or public places (a) Except to sell newspapers sold at large and not sold from a fixed location, no person shall sell anything upon the public streets or from public space in the District of Columbia without a license under this section, unless the person sells at the several markets only the produce they have raised, or unless the person is less than 18 years old and has a valid work permit or street trade badge issued by the Board of Education of the District of Columbia.

consultation with the charging inspector. Respondent appeared on his own behalf. At the hearing, after the nature of the available pleas was explained to Respondent, Respondent changed his plea to Admit with Explanation.

Respondent's major contention in this case is that the fine should be reduced or suspended because he is not engaged in a vending business on public space within the meaning of the provision he is charged with violating.

Accordingly, based upon the entire record in this matter, I hereby make the following findings of fact and conclusions of law.

II. Findings of Fact

By his plea of Admit with Explanation, Respondent has admitted violating the D.C. Official Code § 47-2834 as charged in the Notice of Infraction. On August 24, 2005, Respondent sold items while on public space in the 500 Block of C Street N.W without a vendor's license.

Respondent provides food to workers at construction sites in the city. Before he goes to a site, Respondent makes arrangements with the construction superintendent to deliver food to the site for a specified number of workers at an appointed time when a break for meals will be scheduled. On a typical day, Respondent might have four appointments to deliver food to construction sites, two breakfast appointments and two lunch appointments. Although appointments are made with the construction superintendents to deliver food to the sites, the workers pay for their meals individually.

The meals are delivered to a site from a truck from which the meals are sold. Respondent estimated that 98 per cent of the time, the truck is on private property at the construction site when he is serving food from the truck. However, on some occasions, the nature of the work at a site prevents him from taking the truck onto the site. He then sells food to the construction workers while the truck is partially or completely on public property. Respondent makes sales exclusively to the construction workers at the site and never to members of the public who might be in the vicinity.

The truck used to deliver food to the site is a Fletcher's Catering Company truck. Respondent leases the truck from Fletcher Catering Company for \$300 a week. He purchases the food he sells from a company in Landover, Maryland called Freshmaid, which he does not believe has any relationship to Fletcher's Catering. Respondent does not have a caterers' license. His income from the sale of food at sites is derived solely from gross income from the sale of food less expenses for truck rental, food purchased, and other costs of operations. He does not pay any percentage of the proceeds to Fletcher or any other company.

Construction managers make appointment for food deliveries to their sites because they want to make it possible for workers to get meals quickly without leaving the site. Also, in some locations, nearby fast food restaurants do not have enough capacity to readily serve the number of workers at a site.

On August 24, 2005, the day of the violation charged in the Notice of Infraction in this case, Respondent's truck was partially on private property and partially on public property when he made sales at a construction site. He could not park the truck totally on private property

because of the nature of the work being performed on the site. While vending at the site, he was arrested by a Metropolitan Police Officer for vending without a license and paid a \$150 fine.

There has been a moratorium on the issuance of new vendor's licenses in the District of Columbia for the past several years.

III. Conclusions of Law

Respondent's plea of Admit with Explanation establishes that he violated D.C. Official Code § 47-2834 on August 24, 2005 by selling from public space without a vendor's license. The fines for civil infractions are specified in a schedule of fines promulgated as regulations. There is a fine of \$2000 for a first offense of violating D.C. Official Code § 47-2834 which is set out in 16 DCMR 3301.1 (p). The offense for which this fine is authorized is described in 16 DCMR 3301.1(p) as "operating a street or public space vending business without a license endorsement."

Respondent's major contention in this case is that the fine should be reduced or suspended because he was not engaged in operating a vending business on public space and that the business he is engaged in is catering, since he is providing food at pre-determined times to a specified group of people. It is the Government's contention that if meals are being separately purchased by individuals, as they were in this case, the activity is vending, but that if the food delivery had been pre-arranged and paid for by a single entity, such as the construction company, the activity would be catering.

The provision that Respondent was charged with violating, D.C. Official Code § 47-2834, in relevant part reads as follows:

Sales on streets or public places (a) no person shall sell anything upon the public streets or from public space in the District of Columbia without a license under this section

This language of this regulation makes it clear that it applies only to sales made from the public streets or public space. Thus, if the sales in this case had taken place wholly on private property, the sales would not have been vending within the meaning of this provision whether the purchases were made by individual construction workers or a single person or entity, such as the construction company. When sales are taking place on private property, there may well be violations of other provisions, such as those requiring a catering license or regulations designed to ensure food safety, but there would not be a violation for vending from public space.

In this case, Respondent has admitted that the sales took place at least in part on public space so a violation for selling from public space without a license has been established. However, there are factors and circumstances in this case that warrant a reduction for the substantial fine of \$2,000 imposed for “operating a street or public space vending business without a license endorsement.”, as the offense is described in the provisions that authorizes the fine, 16 DCMR 3301.1 (p). While Respondent did make sales from public space, his use of public space was only incidental and transitory, and occurred only because he could not get his truck on the construction site. Moreover, operating on public space was not the customary way that his business was operated, as Respondent customarily made sales while on the private property at construction sites. In instances where Respondent is operating on solely on private property, he may well be in violation of important measures to protect the public health if he lacks licenses and certifications needed to assure food safety, but such violations have not been charged in this case.

In light of these unique circumstances, and Respondent's acceptance of responsibility by virtue of his plea, a significant downward departure from the maximum authorized fine is warranted, and I will exercise discretion to reduce the fine to \$500. *See* D.C. Official Code §§ 2-1801.03(b)(6) and 1801.02(a)(2); *Koon v. U.S.*, 518 U.S. 81 (1996), *DOT v. Albert Turkus*, DT-V-04-20548, (Final Order 2005).

IV. Order

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this matter, it is, hereby, this _____ day of _____, 2006:

ORDERED, that Respondent shall pay a total of fine of **FIVE HUNDRED (\$500)**, in accordance with the attached instructions within 20 calendar days of the date of service of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if the Respondent fails to pay the above amount in full within 20 calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, starting 20 days from the date of mailing of this Order, pursuant to D.C. Official Code § 2-1802.03(i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits, pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondent,

pursuant to D.C. Official Code § 2-1802.03(i), and the sealing of Respondent's business premises or work sites, pursuant to D.C. Official Code § 2-1801.03(b)(7); and it is further

ORDERED, that appeal rights of any person aggrieved by this Order are set forth below.

February 28, 2006

_____/s/_____
Mary Masulla
Administrative Law Judge